1983

The State of Utah v. Lonnie Ferris Lawson : Brief of Defendant-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff/Respondent, :

v. : Case No. 19106

LONNIE FERRIS LAWSON, :

Defendant/Appellant. :

BRIEF OF DEFENDANT/APPELLANT

APPEAL FROM THE VERDICT AND CONVICTION IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, HONORABLE JAMES SAWAYA PRESIDING

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STATEMENT OF THE NATURE OF THE CASE

Defendant Lonnie Ferris Lawson was convicted by a verdict before Judge James S. Sawaya of criminal homicide, automobile homicide, a third degree felony, and also convicted of driving under the influence of alcohol causing bodily injury, a Class A misdemeanor.

DISPOSITION IN THE LOWER COURT

The case was tried before Judge James S. Sawaya. After a verdict of guilty was returned, Judge Sawaya sentenced Lawson to a sentence of zero to five years on the homicide charge and one year on the Class A Misdemeanor; granted a stay of execution for two years conditioned on (1) defendant serve one year in the Salt Lake County Jail; (2) the court retain jurisdiction; (3) pay restitution as recommended by Adult Probation and Parole; (4) maintain full time employment after jail term sentence; (5) enter and com-

plete alcohol program or any other program deemed appropriate by Adult Probation and Parole; (6) consume no alcohol or frequent places where alcohol is sold; (7) take antabuse if deemed appropriate.

Judge Sawaya sentenced Lawson on Count II, driving under the influence of alcohol causing bodily injury, to one year in the County Jail to run concurrently with Count I, granted a stay of execution for two years and placed defendant on probation under the same conditions as Count I.

From these sentences defendant filed timely notice of appeal.

RELIEF SOUGHT ON APPEAL

Defendant on appeal seeks reversal of the verdicts and dismissal, or in the alternative, reversal and a new trial.

STATEMENT OF FACTS

Clinton Hepner testified (T. 2-35) that on October 9, around 7:00 p.m., he picked up his brother's 280Z Datsun which he had had in his possession for four months but had stored in his parents' garage for the last two and one-half months. The Datsun would not start so he jump started it and picked up his girlfriend, Kelly Fehler. Lights on the Datsun were not checked. They had dinner at the Hawaiian, and after leaving the restaurant driving to his apartment the car sputtered. He stated that when the car sputtered he shifted down to second gear, low RPMs, then

hit the throttle all the way. He claimed he was doing this to get the car going and not hot-rodding it.

When he left the apartment two or three hours later, the Datsun again would not start. He and Kelly had to push start it--he pushing and Kelly at the wheel. They switched sides, with Hepner at the wheel and drove to get some gas, thinking that water in the gas tank was one of the problems in the car and that more gas would alleviate this.

He then drove the Datsun onto the freeway at the 9th South entrance heading towards Sandy. Neither he nor Kelly wore seatbelts. Though heading for Sandy, he found he had to exit at 33d South because the Datsun had killed again. While on I-15 he pulled over to the emergency lane. He had been doing 60 MPH on I-15 (T. 15), and was aware of the problems with the power, battery and gas (T. 29).

Once in the emergency lane, he stated that he used his right hand to stop by pulling the emergency handbrake, used his left hand to turn off the lights and steered with his kneew (T. 16). Coming to a complete stop is the last event he remembers that evening. Hepner testified his foot was on the brake, so his brake lights were on, but on cross-examination he stated that he had no lights on the dash inside the car, so he did not know if the brake lights or directional signal lights were working from the point on I-15 where the Datsun's motor killed nor at the time of the accident.

Orville Peterson testified (T. 35) that on October 8, as he entered I-80 westbound at 20th South to pick up I-15 headed south, he observed a Blazer passing him on the left. He was going about 50 MPH and let the Blazer pass. He then picked up his speed on I-15 and saw the Blazer 100 to 150 feet ahead of him and it remained the same distance away until it exited at 33d South. Thereafter, he saw a cloud of dust and saw the Blazer roll. He parked his car north of the Blazer which was cross-wise and upside down in the road. He saw a man get out of the Blazer window who appeared dazed and was talking unintelligibly and calling out names which made him think someone else had been thrown out of the Blazer. He than saw the Datsun down by a gully near a fence, right side up and facing north, with a male in the driver's seat and another person in the passenger seat.

Mr. Peterson stated he saw the Blazer signal properly as it changed lanes to go on I-15 from I-80 and also saw the Blazer use proper directionals as it exited at 33d South. He stated he saw no other car exiting on 33d South and did not observe the number of people in the Blazer.

There was conflicting testimony as to the position of the female passenger in the Datsun. Mr. Peterson believed her head was in the lap of the driver. Jay Bringhurst, one sho stopped to give aid, thought she was leaning back against the passenger seat Vern Olsen, a police officer, thought she was leaning over to the

left side by the steering wheel. He did not see her head by the clutch pedal. Two paramedics thought her head was near the steering column by the clutch pedal. Initially, Stephanie Demetropolis, an emergency medical technician, stopped at the accident, took pulse and blood pressure of the passenger (T. 187). She testified the blood pressure and pulse were normal though on a second taking of the blood pressure there was a slight change; the systolic and diastolic readings were slightly closer together (T. 194, 199, 201).

Dr. Robert Hood testified that he was a qualified neurosurgeon on call for St. Mark's Hospital on October 9, 1983. Two patients were brought in around 12:45 a.m. who, he was informed, had been involved in the same traffic accident.

Upon examining the female patient, he stated she had irregular, shallow breathing, did not respond to verbal or painful stimuli and was in an extremely deep coma (T. 79). There was no evidence of cuts or bruises and no internal bleeding. A tube was inserted in her air passageway to aid breathing together with the assistance of ventilation from the respiratory therapy crew, and she was given medications because he, Dr. Hood, assumed she had massive injuries to the head. The diagnosis of massive injury to the head was based upon neurogenic pulmonary edema.

Results of the CAT scan and cervical spine x-ray showed there was a subdural hematoma, bleeding on the left side surface

of the brain, but no damage to the gaps and inner spinular gaps in the muscular structure of the spine. There were no broken ribs or injury to the bony structure in the area of the edema in the lungs.

Dr. Hood's conclusion was, since there was no visible injury (T. 84), that the patient suffered injury to the nerve cells in the brain and the brain stem, the lower part of the brain that connects to the spinal cord where respiratory and cardiac functions are generated. There was no postmortem examination or autopsy. He, Dr. Hood, concluded that the patient had forcible movement caused by some shearing force as a result of a sudden deceleration.

On cross-examination Dr. Hood testified that the subdural hematoma was not sufficient in itself to cause death. He also stated that such hematoma could rarely be caused by an aneurysm and death could have been caused by destruction of the medulla. From his examinations he could not tell if the medulla was destroyed. The damaged medulla could not be caused by a whiplash. In summary, Dr. Hood could not testify as to the direction of the trauma to the head and could only say that from the CAT scan and and neurological examination it was a massive trauma to the brain causing brain contusion and injury but he could not identify the nature of the trauma (T. 86-87).

Over objection by defense counsel (T. 233-244) inclusive testimony of Belka was received and the blood sample admitted into evidence.

Lloyd Belka testified he was the Highway Patrol officer dispatched to the scene on October 8 around midnight. When he arrived there were four people about 30 feet from the Blazer. He asked the defendant for identification and observed him to be a bit confused, disoriented and smelled the odor of alcohol. He

He stated the defendant had slurred speech, which may have been the result of a laceration to the chin which was subsequently sutured at the St. Mark's Hospital. He also stated the defendant staggered and he did not believe this was caused by bruises to the knees (T. 264, 275).

At this point Belka took the defendant to his, Belka's, vehicle and told him to remain there while he went down to see the Datsun. He radioed for extra help and then accompanied defendant to St. Mark's Hospital. Belka stated that Mr. Peterson pointed out that defendant was the driver of the Blazer, but on cross-examination T. 261), said Mr. Peterson never told him the defendant was driving the Blazer. No one saw the defendant driving the Blazer (T. 262). No alcohol was discovered in the Blazer; no Maranda warnings were given the defendant. Defendant was no longer free to go at 12:12 a.m. Sgt. Belka gave consent to draw blood from the defendant at 1:18 a.m. (T. 272) and Miranda warnings were subsequently given by Belka at 1;30 a.m. The Blazer was registered in defendant's name (T. 27).

Blood was allegedly drawn from defendant by Kay Fowler, a qualified RN, though she could not identify the defendant in court nor did she know from where the blood was drawn, nor did she have any knowledge as to the number of vials of blood drawn. Prosecutor Harwood attempted to refresh her memory from the transcript of the preliminary hearing (T. 117).

Q: After having read it, does it refresh your recollection as to the proceeding?

A: Not to this particular case. I am in court all the time; I am sorry. I can't remember one case from another.

Thereafter, William Stonebraker, Toxicologist for the Utah State Toxicology Department, testified to the results of a blood test purportedly the blood test of the defendant's. He stated there were two tubes of blood (T. 427) and he did the blood alcohol determination from one tube (T. 430) by means of a gas chromatograph. He received two results. They were .141 and .151 percentage of alcohol per 100 cc. (T. 435). The chromatograph was calibrated. The standard deviation for the known solution of .077 was .002 (T. 436, 440), and the standard deviation for the known solution of .197 was .005 (T. 436, 442). He ran the two samples of blood with 23 other specimens.

Dr. Brian Finkle took the stand. He testified he was a qualified toxicologist, Director of the Center for Human Toxicology, employed by the University of Utah Medical Center. He stated that with such a discrepancy of results (.141 and .151) and the standard deviations testified to by Mr. Stonebraker, he would throw out both test results and run another one as the variation on the two tests was not within either the standard deviation below, to-wit, .007 with a .002 deviation or a .197 with a maximum deviation of .005. Quoting the testimony at T. 482:

Q. by Mr. Hatch: But to check my memory, your answer is you wouldn't accept those basises. You would run another. Is that correct?

Q: Given them just as you have presented them to me, I would have repeated that analysis.

A: Once or twice? In other words....

Q: If the fundamental concept of those standards is wrong, it wouldn't matter if I did it one hundred times. I would still get an unacceptable answer. The point of my lengthy answer to your question is that there should be a continuum of error, analytical error shown with the line I drew. Then at any level you could see whether the test is within or without those limitations.

He also testified that the gas chromatograph is a competent means of testing blood for alcohol given the provisions that the test is done by somone who is qualified, that the equipment is proper and proper procedure is followed (T. 472).

Defendant made objection to the admission of the blood test run by Mr. Stonebraker on the basis of the State's expert witness, Dr. Finkle. The motion was denied. Both sides rested.

Defendant made a motion for directed verdict which was denied by the court.

The jury found the defendant guilty as charged on both counts.

POINT I

THE COURT COMMITTED REVERSIBLE ERROR IN GIVING INSTRUCTION NUMBER 18 WHICH PREJUDICED THE RIGHTS OF THE DEFENDANT.

Instructions in a criminal case must be accurate based and based on the essential elements of the offense charged and failure to do so is reversible error, State v. Laine, 618 P.2d 3

Instruction number 18 on the negligence of another party either nullifies subsequent instructions number 20 and 21 on proximate cause, or in the alternative, confuses the jury.

Instruction number 18 states that is no defense that any victim may have been negligent in one or more respects and thereby contributed to the cause of the accident (R. 084). The above instruction precludes the jury from considering any victim as being a proximate cause of injury and/or death. By his own testimony Clinton Hepner stated he took the Datsun onto the freeway I-15 after he had to jump start it and thereafter push start it. The Datsun Sputtered. All of this occurred and he still chose to take the automobile onto the freeway at night. He stated that after the car killed on the freeway he did not have lights on the dash, he drove onto the emergency lane by steering with his knees, braking with his right hand and turning off the lights, if there were any, by his left hand.

In light of the above actions, to preclude the jury from considering him as the proximate cause of the accident cannot be warranted by the evidence.

The court gave instruction number 18 wherein it states:

> "In the crimes of automobile homicide and driving under the influence of alcohol causing bodily injury it is no defense that any victim may also have been negligent in one or more respects and thereby also contributed to the cause of the accident. The test to be applied is whether you find

> from all facts that the defendant was negligent and that said negligence caused the death of Kelly Fehler and proximately caused the injuries to Clinton Hepner."

Thereafter, the court gave instruction number 19, a stock instruction, that no inference may arise from the fact that an unfortunate and fatal accident happened. Then, the court gave the defendant's request number 4 as instruction number 20, a stock instruction on proximate cause.

Instruction number 21 sets forth as follows:

> "If you find that defendant was negligent and that the proximate cause of the alleged harm was an independent intervening act of a person not a party to this case, that the defendant in the exercise of ordinary care could not reasonably have anticipated as likely to happen, the defendant's original negligence is superseded by the intervening act and is not the proximate cause of the alleged harm. However, if in the exercise of ordinary care the defendant should reasonably have anticipated the intervening act, it does not supersede his original negligence or break the chain of proximate causation."

It is pointed out that Mr. Hepner, though a victim, was not a party to this case, parties being the State of Utah and the defendant. This Court has as recently as State v. Ruben, 663 P.2d 445, reiterated that instructions should not be considered in isolation in order to predicate a claim of error upon it, but instructions must be read and stand as a connected whole. It seems difficult to read the two instructions, to-wit, 18 and 20, supra, without confusion arising in the mind of those

reading them, especially jurors not legally trained. As the Ruben case, supra, points out, the jury must be given some guide as to how and when the drinking of intoxicants constitutes simple negligence. Agreeing that this being a criminal case does not come under the comparative negligence doctrine, there must be some instruction as to when the imbibing of alcohol becomes simple negligence. The writer contends that the only way the jury could read instructions 18 and 20 together would require them to not consider at all the court's proper instruction on proximate cause.

POINT II

THE COURT ERRED IN ALLOWING THE RESULTS OF THE BLOOD TEST TO GO TO THE JURY.

In reading the testimony of the toxicologist William Stonebraker, who received the vial of blood and tested it, he ran two tests on the sample along with 23 other samples not related to the case. One sample ran .141 and the other sample .151. He further testified that the standards which at that time were run on the gas chromatograph apparatus allowed deviations for a valid test of less than the .01 deviation which resulted from his two tests of the blood. Mr. Stonebraker in testifying as to the tolerances established at the laboratory in which he worked, at pages 436 and 437 and again on cross-examination at pages 442 through 450, stated that they used standards of .072 to .082 for the low control and .185 to .209 for the high control. They had no controls in the area wherein the samples

of the defendant's blood fell. He admitted that the laboratory's margin of error is .05% which would make the standard deviation for the low control .002 and the standard deviation for the high control .005, and further, at line 2, T. 443:

> Q: Well, the difference between your .141 and your .151 is in excess of your deviation allowance; is it not?
>
> A: Not for these controls which we figured the standard deviation on.
>
> Q: Low control is .002; is that correct?
>
> A: Well, at any rate, the low figure was reported.
>
> Q: That is not what I am talking about. I am talking about your standard deviation.
>
> A: I don't figure a standard deviation on the unknown specimen, sir.

The State called Dr. Brian Finkle as an expert witness on toxicology and alcohol in the blood. Dr. Finkle, after being given hypothetical questions as to the standards and variations, testified to concluding that if the tests were over the variations, the proper laboratory procedure would be to throw out both tests and run another (T. 479). Despite this testimony the court, over objection, allowed the lower of the blood alcohol tests into evidence.

The State recalled toxicologist Stonebraker to try and rectify his testimony as to their laboratory standards (T. 491, etc.); however, the State was unable to lay a foundation to admit

the standards brought with him into evidence leaving the testimony of the State's witness, Brian Finkle, to the basis that he would not admit the lower of the two tests run by Stonebraker, to-wit, .141 and .151, but would have to run them over to get an acceptable blood alcohol.

POINT III

THERE WAS NO EVIDENCE PUTTING THE DEFENDANT BEHIND THE WHEEL OF THE CAR AT ANY TIME.

Mr. Peterson, the first witness at the scene, was unable to identify the person he saw crawling out of the car (T. 44):

Q: Would you recognize the person if you saw him again?

A: I couldn't certify if I could. No.

And at T. 51:

Q: I see. You didn't get a good enough view of the person and you couldn't identify him?

A: That is correct.

Mr. Peterson also talked about the person he saw coming out of the car asking where two other people were, indicating there had been more than one person occupying the car at the time of the accident.

Mr. Jay Bringhurst testified that he saw a person he identified as the defendant crawling out of the window of the car (T. 53), but never identified that person as the defendant and never saw him driving the car or in control of the automobile.

Sgt. Belka indicated that Mr. Peterson had pointed out the defendant as the driver of the automobile but stated on cross-examination that Peterson had not pointed him out as the driver, see T. 219:

> Q: Who was it who attracted your attention to him (the defendant)?
>
> A: Orville Peterson.
>
> Q: The same Orville Peterson who was here in court as a witness yesterday?
>
> A: That is correct.

Then Belka testified (T. 296) that Mr. Bringhurst and Mr. Peterson indicated to him that Mr. Lawson was the man they saw in the vehicle but neither indicated they saw him driving. This leaves only the statement of Mr. Lawson when Sgt. Belka asked if he was driving the vehicle and he answered "Right", and is in direct contravention to a long series of cases in Utah allowing a person to convict himself by his own confession or admission without a prior foundation showing the elements of the crime charged.

SUMMARY

It is respectfully requested that the Court consider the errors in law herein and reverse and remand for a new trial

especially the confusion arising from the instructions as to negligence and probable cause.

DATED this 26th day of September, 1983.

Respectfully submitted,

Sumner J. Hatch
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that on the 26th day of September, 1983, two copies of the foregoing Brief of Defendant/Appellant were placed for delivery by TRS messenger to the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, UT 84114.